## MISCELLANY.

ANOTHER VIEW—THE "ACT OF GOD" AND PROXIMATE CAUSE.—In its recent decision in *Herring* v. *Chesapeake & Western R. R. Co.* (September, 1903, IX Virginia Law Register, 534) the Supreme Court of Appeals of Virginia has ranged itself on what, in our judgment, is the wrong side of a judicial controversy. It was held that a common carrier, though guilty of negligent delay in transporting stock, was not liable for injury thereto inflicted by severe weather which overtook them in transit in consequence of the delay; that the severe weather and not the delay was the proximate cause of the injury, and to this cause only the law would look; that severe weather is an act of God, for the consequences of which a common carrier is not liable. The court cited and relied upon the decision of the Supreme Court of the United States in *Railroad Co.* v. *Reeves*, 10 Wall. 176, and the Massachusetts decision of *Denning* v. *N. Y. Cent. R. R. Co.*, 13 Gray, 481, without considering authorities in other jurisdictions to the contrary. In Shearman & Redfield on Negligence (vol. I, sec. 40, fifth edition) the controversy to which we have alluded is succinctly set forth in the following language:

"A serious difference of opinion has arisen as to what is a natural sequence of negligence, exposing the property of another to injury. In Pennsylvania, Massachusetts, Ohio, Iowa, Nebraska and Arkansas, as well as in the the United States Supreme Court, it is held that where a carrier, by negligent delay, exposes goods to injury by the 'act of God' or other cause for which he is not responsible, and which he could not naturally foresee, he is *not* liable for injuries arising from such a cause, although they would not have affected the goods if he had not negligently delayed their transportation. This decision is put upon the ground that he could not reasonably have anticipated such a result of his delay, and that, for aught that he could possibly foresee, promptness might have exposed the goods to the risk quite as much as delay. In New York, New Hampshire, Missouri and Tennessee, the very opposite doctrine is firmly settled. In all courts, the act of a master of a vessel, in deviating from the usual course of his voyage, would be held the proximate cause of damage caused by a tempest, in itself the 'act of God.'"

We are clearly of the opinion that the New York doctrine is much more just and practically expedient than the ground taken in Virginia, Massachusetts and other states. Indeed, there may be something approaching *reductio ad absurdum* in the view that, no matter how long a carrier's delay may be, nor how gross its negligence, it is entirely exonerated and the owner of property has no redress, if some extraordinary action of the elements intervene.

Two cases in the New York Court of Appeals that set forth the New York view are *Michaels* v. *N. Y. Cent. R. R. Co.*, 30 N. Y. 564, and *Read* v. *Spaulding, Id.* 630. In the latter case it was specifically held (syllabus):

"When a carrier is entrusted with goods for transportation, and they are injured or lost on the transit, the law holds him responsible for the injury.

He is only exempted by showing that the injury was caused by an 'act of God' or the public enemy. And to avail himself of such exemption, he must show that he was himself free from fault at the time.

"His act or neglect must not concur and contribute to the injury. If he departs from the line of his duty and violates his contract, and while thus in fault, and in consequence of that fault, the goods are injured by the 'act of God,' which would not otherwise have caused the injury, he is not protected."

In *Michaels* v. *N. Y. Cent. R. R. Co., supra,* the following language from the opinion tends to furnish a theoretical justification of a righteous result:

"What is precisely meant by the expression 'act of God,' as used in the case of carriers, has undergone discussion, but it is agreed that the notion of exception is those losses and injuries occasioned exclusively by natural causes, such as could not be prevented by human care, skill and foresight. All the cases agree in requiring the entire exclusion of human agency from the cause of the injury or loss. If the loss or injury happen in any way through the agency of man, it can not be considered the 'act of God;' nor even if the act or negligence of man contributes to bring or leave the goods of the carrier under the operation of natural causes that work their injury, is he excused. In short, to excuse the carrier the 'act of God,' or *vis divina,* must be the sole or immediate cause of the injury. If there be any co-operation of man, or any admixture of human means, the injury is not, in a legal sense, the 'act of God.'"

The purport of this reasoning would seem to be to exclude the legal idea or classification of "proximate cause" from application to the "act of God." It is to be treated as something not mingling with other causes in the network of human actions and foreseeable events, but special and arbitrary in its character. In such view it may consistently be held that negligence, which brought property that otherwise would have escaped within the operation of an "act of God," is the proximate cause of the injury or loss.—*New York Law Journal.*

---

NAVIGABLE WATERS.—Having published (*ante,* p. 572) the criticism of *Case and Comment* upon a decision of the Sup. Ct. U. S. upon the law of navigable waters, we deem it proper to give place to the following defense of the ruling from the *Central Law Journal,* of October 23, 1903:

WHAT ARE NAVIGABLE WATERS?

The subject of navigable waters has been one of the great controversial questions of the law, and our honored contemporary, *Case and Comment,* therefore, may possibly be pardoned the gross error committed in the publication of a recent editorial, entitled "A Misleading Opinion," in which a quotation from the decision of the United States Supreme Court in the case of *Illinois Central R. R.* v. *Illinois,* 146 U. S. 387, is severely condemned as tending "to confuse the law on the subject of navigable waters," contradicting "the doctrine of an earlier decision of the same court," and misstating "the fundamental rule of the common law on the subject." Truly

a most formidable and serious indictment against the highest court in the land.

The language of the Supreme Court which provoked our contemporary's criticism, is as follows: "By the common law the doctrine of the dominion over and ownership by the crown of lands within the realm under tide waters is not founded upon the existence of the tide over the lands, but upon the fact that the waters are navigable, tide waters and navigable waters, as already said, being used as synonymous terms in England." The court added: "The doctrine is founded upon the necessity of preserving to the public the use of navigable waters from private interruption and encroachment, a reason as applicable to navigable fresh waters as to waters moved by the tide." "The contradiction of this declaration" says our contemporary, "and that of the court in *Jones* v. *Soulard*, 24 How. 41, 16 L. Ed. 604, is unmistakable. In that case, which involved a question of title to land under the Mississippi, the court said: 'Many authorities resting on adjudged cases have been adduced to us . . . . to show that from the days of Sir Matthew Hale to the present time all grants of land bounded by fresh-water rivers, where the expressions designating the water line are general, confer the proprietorship on the grantee to the middle of the thread of the stream;' and added: 'We think this, as a general rule, too well settled as a part of the American and English law of real property to be open to discussion; and the inquiry here is, whether the rule applies to so great and public a water course as the Mississippi is at the city of St. Louis.' The conclusion was that the size of the river did not alter the rule, or permit the application of the doctrine by which grants of land are bounded by ordinary high-water mark 'on rivers where the tide ebbs and flows.' We have, therefore, in the case of *Jones* v. *Soulard*, an express and clear declaration of the common-law right of private ownership to the bed of a great navigable river such as the Mississippi at St. Louis, while in the later case we have an equally express declaration that by the common law the doctrine of the crown dominion and ownership over lands under navigable waters applies to navigable fresh waters as much as to waters moved by the tide. It is true that in the later case the question to be decided was with respect to land under one of the Great Lakes, but that the court intended its language as to navigable fresh waters to be as broad as the words it used is clear from its argument from the navigability and commercial importance of our great rivers."

The *Central Law Journal* a few years ago had occasion to consider the question of navigable waters in all of its phases. 53 Cent. L. J. 349. We shall undertake at this time to abridge and emphasize here what we said at that time.

We believe that while the United States Supreme Court in the case mentioned may have been a little inaccurate in some of the language used, our contemporary is equally unfortunate in endeavoring to clear up the matter. The general rule of law on this question is that navigable waters belong to the crown or state, while non-navigable waters are the property of adjoining owners. But what is the test of navigability? In England orig-

inally, only such streams were considered navigable in which the tide ebbed and flowed. Over such waters the king or the state had absolute sovereignty and the tide to the bed and shores up to the high-water mark was in the king. Later a distinction began to be recognized between waters navigable in law, which referred only to tidal waters and waters navigable in fact, which referred to bodies or streams of fresh water which were actually capable of navigation, whether the tide ebbed or flowed in them or not. Over such waters the state or public were said to have an easement or right of highway by prescription. *Williams* v. *Wilcox*, 8 Ad. & El. 314, 333; Woolrych on Waters, 31. The latter authority says: "Waters flowing inland, where the public have been used to exercise a free right of passage from time whereof the memory of man is not to the contrary, or by virtue of legislative enactments, are public navigable rivers." Navigability in this last sense had reference only to the use of the stream as a public highway,—the ownership of the bed and all other proprietary rights were resident in the adjoining owners. Lord Denman expressed in this rule succinctly in *Williams* v. *Wilcox*, *supra*: "It is clear that the channels of public navigable rivers were always highways; up to the point reached by the flow of the tide the soil was in the crown, and, above that point, in the owners of the adjacent lands. In either case, the right of the subject to pass up and down was complete."

This is the state of the law on this subject as it exists today in England. It is also the rule adopted by many of the states of the American union, especially the smaller states of the east. *Norway Plains Co.* v. *Bradley*, 52 N. H. 86; *Fletcher* v. *Phelps*, 28 Vt. 257, 262; *Holden* v. *Manufacturing Co.*, 65 Me. 215; *Commonwealth* v. *Vincent*, 108 Mass. 441, 447; *Welles* v. *Baily*, 55 Conn. 292; *Cobb* v. *Davenport*, 32 N. J. L. 369; *Goodsell* v. *Lawson*, 42 Md. 348; *Chenango Bridge Co.* v. *Paige*, 83 N. Y. 178; *Kaskaskia Commons* v. *McClure*, 167 Ill. 23; *Williamson* v. *Haskell*, 50 Mich. 364; *Lake Shore R. R. Co.* v. *Platt*, 53 Ohio St. 254; *Allen* v. *Weber*, 80 Wis. 531. It might be stated, however, that one requirement of the common-law right of navigation over inland waters, *i. e.*, that it must be required by long user or prescription, has, for obvious reasons, been disregarded by courts in these states in applying the same rule in this country. In all these states the owners of lands situated on the banks of navigable streams own the river-beds, subject to the public right of navigation.

In nearly all the other states of the union, where this question has been decided, the common-law rule has been rejected, and all navigable waters, *i. e.*, those waters which are navigable in fact or which do or which may afford a channel for commerce,—belong to the state in fee, the rights of riparian owners extending only to the low water mark. *Alleghany City* v. *Moorehead*, 80 Pa. St. 118; *State* v. *Tomlinson*, 77 N. Car. 58; *In re Garnett*, 141 U. S. 1; *McManus* v. *Carmichael*, 83 Iowa, 1; *Webb* v. *Demopolis*, 95 Ala. 116; *Hahn* v. *Dawson*, 134 Mo. 581; *Gilbert* v. *Emerson*, 55 Minn. 254; *St. Louis Ry. Co.* v. *Ramsey*, 53 Ark. 314; *Weise* v. *Iron Co.*, 13 Oreg. 496; *Shoemaker* v. *Hatch*, 13 Nev. 261; *Wood* v. *Fowler*, 26 Kan. 682; *Bucki* v. *Cone*, 25 Fla. 1; *Heckman* v. *Smett*, 99 Cal. 303, 32 Cent. L. J. 284, 297.

But whether we embrace within the legal meaning of the term "navigability" the proprietary right of the government in the bed of the streams as well as the right of easement to the use of the stream as a public highway, or only the latter signification, the test of the navigability is the same in one case as in the other. The ebb and flow of the tide is absolutely no test at all of the navigability of waters in this country under any phase of the question,—the final and conclusive test in all such cases is whether the stream is navigable in fact. This last question is sometimes one of great difficulty and can most satisfactorily be answered by a review of the decided cases. The general rule on this subject was very accurately laid down by Justice Field in the case of *The Daniel Ball*, 10 Wall. (U. S.) 557, 563, where he states: "Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are suspectible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water."

EDITORIAL NOTE.—In reply to a letter, calling the attention of the editor of *Case and Comment* to the foregoing, he replies:

"Your very kind letter of the 10th inst. is received. The *Central Law Journal's* criticism of *Case and Comment* has been carefully examined. It is certainly a surprising criticism. Our article was solely as to the doctrine of the ownership of land under navigable waters. Their criticism is entitled, "What Are Navigable Waters?" Next, in assuming to quote our statement that the opinion tends 'to confuse the law on the subject of navigable waters,' they interpolate the words 'of navigable waters,' thus grossly misrepresenting our statement, which was not made about navigable waters, but about the ownership of their bed. Further, it assumes to give an abstract of the law on the subject of navigable waters. The substance of all it says as to the ownership of the bed of such waters in this country is that the rule is different in different states. This is what we said. As to the law in England, it gives one single sentence quoted from the opinion of Lord Denman, that 'up to the point reached by the flow of the tide the soil was in the Crown.' This is exactly what we said was the English law, while the opinion we criticised declared that navigability, and not the existence of the tide, was the test. The result of the most careful examination of this criticism is that it attributes to us in general words a 'gross error,' and then, in all its specific and definite statements of law, at least so far as it cites any authorities, it confirms what we said. Some confusion in the mind of the editor of the *Central Law Journal* seems to exist as to the distinction between the question of navigability of waters and that of the ownership of their bed. The questions are entirely distinct.